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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

AZALEA DRIVE-IN THEATRE, INCORPORATED,
and TWIN DRIVE-IN THEATRE, INC.,
Petitioners,

v.

EDWARD A. SARGOY, JOSEPH L. STEIN and
BURTON H. HANFT, d/b/a SARGOY, STEIN
& HANFT (a partnership),
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners, Azalea Drive-In Theatre, Incorporated, and Twin Drive-In Theatre, Inc., pray that a writ of certiorari issue to review the judgment of the Virginia Supreme Court rendered in these proceedings on June 13, 1975.

OPINIONS BELOW

The decision of the Virginia Supreme Court rejecting petitioners' appeal and refusing the Petition for Writ of Error

and Petition for Rehearing, are included in the Appendix, infra.

JURISDICTION

The decision of the Virginia Supreme Court was entered on June 13, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a Virginia state court is obligated, under Article VI, Clause 2, of the Constitution of the United States, to consider a federal claim and affirmative defense properly raised under § 1 of the Sherman Antitrust Act.

2. Whether the Court below violated petitioners' Constitutional Rights in refusing to consider the property cognizable defenses raised under the Sherman Antitrust Act, where petitioners had asserted that the promissory note being sued upon was obtained as a direct result of respondents' violation of said Federal Statute.

3. Whether the Court below violated petitioners' Constitutional Rights in denying petitioners' request for trial by jury on the factual issues where the purported waiver to such rights to trial by jury was contained in an allegedly void instrument and was obtained in violation of petitioners' rights under the Seventh Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Article VI, Clause 2:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Constitution of the United States, Amendment VII (in pertinent part):

> " . . . [I]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law"

Bill of Rights of Virginia, Article I, Section 2 (in pertinent part):

> "[I]n controversies respecting property and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. . . . "

STATUTES INVOLVED

The pertinent text of these provisions

is set forth in the Appendix, infra:

§ 1 of the Sherman Antitrust Act, codified at 15 U.S.C. §1 (1970);

§ 2-303 and 3-305 of the Uniform Commercial Code, codified as Va. Code Ann., §§ 8.2-302(1), 8.3-305 (Repl. Vol. 1965).

STATEMENT OF THE CASE

Petitioners, Azalea Drive-In Theatre, Inc., and Twin Drive-In Theatre, Inc., own and operate local motion picture drive-in theatres at two locations in the Tidewater area of Virginia. In the industry, they are known as "exhibitors."

Respondents, Sargoy, Stein & Hanft, constitute a law firm in New York City. Their firm is unique, and, in fact, the only law firm of its kind in the country. The firm represents nine motion picture distributors involved in this case and have done so for over 30 years. These nine distributor clients are Paramount Pictures Corp., Metro-Goldwyn-Mayer, Inc., Twentieth Century Fox Film Corporation, Warner Brothers Distributing Corporation, Buena Vista Distribution Company, Inc., United Artists Corporation, Universal Film Exchanges, Inc., Columbia Pictures Industries, Inc. and American International Pictures, Inc. These and other distributors are the only clients that the law firm has, and represent "at least 75%" of the total motion picture distribution industry in the entire United States. The firm does not provide the traditional type of legal services, but rather the bulk of its work for the distributors is concerned with

policing exhibitors on a nationwide basis, discovering and pursuing alleged claims for inaccurate reporting of gross receipts and for additional amounts of film rental allegedly due. Of some 55 people employed by the firm, only two are attorneys.

Pursuant to their nation-wide business of exhibitor auditing, respondents, in December 1970, initiated an audit procedure as to admission receipts for various film showings at petitioners' theatres. Petitioners did, at all times, fully cooperate with the audit, in view of the understanding in the trade, and of the pertinent film leasing agreements.

At the time of the commencement of the audit, respondents had no indication of underreporting of admissions. In fact, even after their extensive audit by Philip Kornfeld, respondents' agent, there were no deficiencies found in the petitioners' reports and no underreporting of any substance. There was no break in the ticket continuity nor where there any deficiencies in deposit slips when compared with net receipts.

Using, however, a combination of self-created theories that there was a nationwide average of 2.2 persons per automobile patronizing a drive-in theatre and that there was an arbitrary average of concession receipts for food and beverage sold based on reported admissions, respondents concluded that petitioners had underreported admissions and charged that petitioners allegedly owed respondents some $240,000 for alleged underreported admission receipts.

Petitioners' President and principal,

Earnest Price, and his accountant, Carl Katz, were shocked with any such claim; they repeatedly denied any debt at all and throughout the five or six meetings between them and respondents' auditor, Kornfeld, continuously and repeatedly challenged the accuracy and appropriateness of any such arbitrary "2.2 persons per automobile" or appropriate or justifiable relationship between concession receipts and the amount of admissions that they always contended had properly been reported to plaintiffs.

When petitioners refused to acknowledge any indebtedness to respondents, in the various conferences with their auditor; and when petitioners stated that they would not pay any monies to respondents because they did not owe any money to respondents, petitioners' principal, Earnest Price, and his accountant, Katz, were then told by respondents' agent and auditor, Kornfeld, that if petitioners did not pay a 40% fee of the alleged $240,000 immediately, or give him a promissory note for that amount, that he could "take back to New York that day," that the distributors were not going to give Price and his theatres any more film at all; that the distributors would cut off the film, claiming "fraud" on the part of petitioners and that he would get no more film from them.

Price and Katz both testified without reservation at the trial that they were "shocked"; that they told Kornfeld that it would mean that Price would be out of business; that he could not operate his theatres without films from the distributors who represented the biggest

portion of the film distributorship in the United States; that it would "ruin" Price; that he would lose everything he had.

After a very short conference in the hall, it being agreed by Price and Katz that if they did not execute a note that Price would suffer financial ruin, they returned to the room and negotiated with Kornfeld for the least amount that the distributors would accept, which resulted in the $70,000 figure.

In 1971, respondents brought suit against petitioners in the Circuit Court of the City of Norfolk, Virginia, alleging that petitioners had defaulted on a promissory note held by and payable to respondents. Respondents claimed that the $70,000 note was given by petitioners in settlement of their claim for back film rental, purportedly owed to the distributors because of alleged underreporting of gross receipts by petitioners over a period of years.

On April 10, 1972, petitioners properly answered respondents' pleadings by asserting that the note was executed under duress, without lawful consideration, as a result of a threat by the major distributors conveyed by respondents' agent, to boycott and refuse doing business with petitioners if the note were not executed.

In addition, petitioners answered by interposing an affirmative defense and counterclaim, alleging a combination and conspiracy in violation of the Sherman Act and the Robinson-Patman Act by respondents, the distributors, and other co-conspirators, as evidenced by the threatened boycott. The affirmative defense and

counterclaim were both dismissed by the Trial Court, on motion of respondents, as not cognizable in the state forum, and the federal antitrust issues were expressly excluded from consideration by the Trial Court.

The action was tried before the Honorable Edward J. Ryan on September 24 and 25, 1973, without a jury, over petitioners' objections.

The note being sued upon contained a clause, which respondents contended was a "waiver" by petitioners of their right to trial by jury. Petitioners had moved the Court, in the required manner, for a trial by jury, to which request respondents filed a Motion to Strike Defendants' Jury Trial Request and the Court sustained the Motion of respondents to strike petitioners' request, and, accordingly, refused to allow the issues to be heard by a jury.

On September 21, 1973, petitioners moved to continue or stay the proceedings on the ground that there was then pending in the United States District Court for the Eastern District of Virginia, at Norfolk, a newly-filed suit in which petitioners were plaintiffs, under the federal antitrust statutes, against respondents herein and treble damages. The Trial Court overruled petitioners' Motion to Stay, and the matter proceeded to a trial.

By Memorandum of January 4, 1974, the Trial Court decided the issues in favor of respondents and, on the 31st day of January, 1974, the Court entered an Order granting judgment against petitioners in the amount of $70,000 together with interest

at the rate of 7% per annum from February 12, 1971, until paid, and attorneys' fees in the amount of $17,500 and costs.

However, the Trial Court never ruled on the specific question of whether or not the distributors, through respondents, had threatened a group boycott or refusal to deal with petitioners. Instead, the Court simply considered whether there was "sufficient and convincing evidence of duress on the part of the plaintiffs [respondents]," and resolved that issue of Virginia common law duress in favor of respondents.

Final judgment on the note in the Trial Court was affirmed by the Supreme Court of Virginia on April 28, 1975. The Supreme Court of Virginia, likewise, did not consider the question of whether or not a threat of boycott had been made. The Supreme Court also affirmed the Trial Court's holding that petitioners could not assert antitrust violations by respondents and others as a defense, and that petitioners' antitrust counterclaim was not cognizable in a Virginia State Court. The denial of trial by jury was also affirmed.

Rehearing was denied by the Virginia Supreme Court on June 13, 1975, and petitioners now ask this Court for relief.

REASONS FOR GRANTING THE WRIT

I. The Virginia State Court was obligated, under Article VI, Clause 2, of the Constitution of the United States, to consider the federal claim and affirmative defense properly raised under § 1 of the Sherman Antitrust Act.

It is part of the basic constitutional scheme that state courts are not only competent but obligated to consider federal claims raised there. The "Supremacy Clause" of the United States Constitution provides, in pertinent part, that:

> " . . . [T]he laws of the United States . . . shall be the supreme law of the land; and the judges of every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Petitioners submit that the Supremacy Clause mandates that the Trial Court below consider petitioners' claims and defenses under the federal antitrust laws.

Indeed, Congress may create new statutory rights, such as those created in the enactment of the Sherman and Robinson-Patman Acts, and compel the states to make their judicial machinery available for enforcement proceedings. For example, the Emergency Price Control Act of 1942 permitted treble damage suits for violations of federal price regulations. Even assuming that such a statute

was "penal" in nature, this Court held in Testa v. Katt, 330 U.S. 386 (1947), that the Supremacy Clause does not permit state courts to decline enforcement of such federal statutory rights on local policy grounds— at least where the state courts "have jurisdiction adequate and appropriate under established local law to adjudicate this controversy." See also, Miles v. Illinois Central R. Co., 315 U.S. 698 (1942) reh. denied, 316 U.S. 708 (1943); R. H. Bouligny, Inc., v. United Steel Workers of America, AFL-CIO, ____ N.C. ____, 154 S.E.2d 344 (1967); Anderson v. Andrews, 156 F.2d 972 (E.D.Pa. 1946), reversed on other grounds, 331 U.S. 461 (1947); In Re Ann Harbor Brewing Co., 110 F. Supp. 111 (S.D.Mich. 1951); Parker v. State, 185 Misc. 584, 57 N.Y.S.2d 242 (1945).

In the instant case, there can be no question that the Circuit Court of the City of Norfolk had jurisdiction adequate and appropriate to consider petitioners' antitrust defense. There may still remain some question as to whether or not Congress granted exclusive jurisdiction to federal courts for treble damage claims under § 4 of the Clayton Act, codified at 15 U.S.C. § 15. However, the Trial Court certainly could have, and should have, considered petitioners' request for injunctive relief and the affirmative defense based on the antitrust laws.

An important question concerning the Supremacy Clause of the Constitution and the interpretation and reach of federal statutes is presented in the instant case. Petitioners urge this Court to assume jurisdiction and resolve these controversies.

II. The Court below violated petitioners' constitutional rights in refusing to consider the properly cognizable defenses raised under the Sherman Anti-Trust Act, where petitioners had asserted that the promissory note being sued upon was obtained as a direct result of respondents' violation of said federal statute.

Petitioners respectfully submit that under the express provisions of the Sherman Anti-Trust Act, 15 U.S.C. § 1, and the Robinson-Patman Act, 15 U.S.C. § 13, the combination of motion picture distributors, represented by the respondents, which constituted approximately 75% of the total industry in the United States and which threatened economic reprisal against the petitioners that would have meant their destruction had they not executed the subject note, was an unlawful combination that constituted a violation of those provisions.

The overwhelming evidence demonstrated that it was the threat of economic reprisal against the petitioners that brought about execution of the subject note.

At the trial below, respondents urged that the consideration for the note was not any threat, but, on the contrary, was because of a promise of forebearance by respondents from instituting a law suit.

This position was apparently taken because of an isolated answer in a discovery deposition of the witness, Earnest Price, president and principle of each of the corporations, to the effect that the note had been executed to avoid suit. However, Price stated in full explanation in the discovery deposition the following, clearly indicating that it was the threat that prompted the note. At page 10, beginning at line 8 of Price's discovery deposition, the following occurred:

> "Q Was the purpose of this meeting to negotiate some kind of settlement?
>
> "A The purpose of that visit, his calling, was to take back money. He made me believe that he was going to stop all sources of film if I did not do as they said."

* * * *

At page 11, beginning at line 5, the following:

> "A I did not agree really to it, but finally I figured that if I was going to stay in business I had to go along with whatever he wanted."

At page 11, line 13, the following:

> "A If I lose those film companies I have to go bankrupt. That is what I am in business to do, to show their films."

* * * *

At page 16, line 4, the following:

> "Q I would like for you to specify what you have in mind.
>
> "A Well, like him telling me that I wasn't going to get film from these film companies if I did not come across with the amount of money they wanted. Then later I found out that that was not true."

* * * *

The following exchange in that deposition testimony demonstrating clearly that any fear Price had of a law suit was the reality that fighting respondents in court, in their contention that he owed any money, would take so long that if respondents carried out the threat repeatedly made of no films to Price, that he could not have existed or lasted through any litigation.

Thus, at page 16 of Price's discovery deposition, Price testified:

> "Q Did it ever occur to you that you ought to make him try this in court to see whether he could prove it, rather than agreeing to sign the note?
>
> "A If he had told me the truth, can you imagine how long I would have been without film before he could have proven it?
>
> "Q When you say if he had told you the truth, again you are suggesting that he was dishonest with you. Will you please specify what you mean?

"A If you told me that I can't get film, when I can get film, would you say that is dishonest?"

* * * *

The only compromise ever made between the parties was to compromise the larger amount of $88,000.00 down to $70,000.00 - but all of said negotiation was done, not in acknowledgment by petitioners that anything was due, but solely because of the economic threat and duress.

While the testimony of petitioners' witnesses with regard to the threat of economic reprisal was positive and clear, the testimony of respondents' agent, Kornfeld, was negative and vague. While at the trial Kornfeld denied making any such threats, at the discovery deposition his answer was that:

"Q Do you maintain that you did not tell them that you had to have something signed that day when you went back to New York?

"A I don't remember saying that." (Disc. dep. p. 109)

* * * *

And at page 113 of the discovery deposition, his testimony was:

"Q Mr. Kornfeld, was there any occasion during the meeting that resulted in Mr. Price signing a note, where he said to you words to the

effect that 'If the company stops selling me pictures, I am out of business'; didn't he tell you that?

"A He may have said something like that, yes.

"Q You recall that?

"A Yes."

Both at the deposition and at the trial, while so admitting, Kornfeld could give no explanation of why any such subject was brought up and could not remember in "what context" it was said. At page 105 of the transcript of the trial proceedings, the following occurs:

"Q Didn't Mr. Price talk to you about, 'I will be put out of business'? Did he talk to you about that?

"A I indicated to you in my deposition that I remember something of him making a statement of that sort, but what context or what connection, I don't know.

"Q That is what I want to find out. Do you admit and do you recall that there was conversation: Mr. Price said, 'Well I will be out of business. I won't have any more business left.' Didn't he tell you that?

"A He may have said something like that. I seem to recall, yes.

"Q Well, you are getting kind of vague there. You do recall, don't you?

"A Yes.

"Q Well, what do you mean, you 'seem to recall'?

"A I recall, Mr. Sacks.

"Q All right. Now, this man told you, 'I will be out of business' and you tell us you don't know in what context he said that?

"A Yes sir.

"Q In what context did he?

"A I don't know.

"Q You don't remember?

"A I don't know.

"Q So you remember that part of the conversation but you don't remember it all?

"A I seem to remember--I was sitting in--I seem to remember a remark like that but I don't remember in what context it was made."

Thus it is clear that undoubtedly, the execution of the subject promissory note was a direct result of the prohibited action of the illegal combination, rendering the note void and unenforceable.

It is further submitted that the court below should have taken cognizance of the anti-trust statutes and that its failure to do so constituted reversible error.

Under the Sherman Act, one is protected against concerted action by businessmen to deprive others of access to merchandise which the latter wish to sell to the public. The Act is violated by collective action withholding from another of valuable service germane to the other's business and important to his effective competition with third persons. It has been held that a combination of motion picture distributors to refuse to release films to an exhibitor, in order to put him out of business, because he has refused to deal with some of the distributors, violates the Sherman Act. Arbitrary or unreasonable requirements imposed as a condition of leasing films would also potentially violate the Act. Binderup v. Pathe Exch., 263 U.S. 291.

Specifically, the Sherman Act states, "That every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is delared to be illegal."

Each case arising under the anti-trust laws or the Sherman Act demands a "close scrutiny of its own facts." Sugar Institute, Inc. v. United States, 297 U.S. 553; Maple Flooring Manufacturers Assoc. v. United States, 268 U.S. 563.

The term "trade or commerce" as used in the Sherman Act, has been held to include production, distribution, and exhibition of motion pictures. United States v. Paramount Pictures, Inc., 334 U.S. 131.

The term "restraint of trade" means what is meant at common law, to-wit, those acts which prejudice public interest by unduly restricting competition or unduly obstructing the due course of trade, or which injuriously restrains trade either because of their inherent nature or effect or because of their evident purpose. United States v. American Tob. Co., 221 U.S. 106.

Because of the very broad nature of the Sherman Anti-Trust Act, § 1, the courts have adopted a "rule of reason" which requires every case to be analyzed closely on its facts to determine violations of the Sherman Anti-Trust Act. The leading case is United States v. E. I. DuPont-Demours & Co., 315 U.S. 377.

Other cases bringing motion pictures or films under the scrutiny of the Sherman Anti-Trust Act are United States v. First Nat'l Pictures, Inc., 282 U.S. 44; and Paramount Famous Lasky Corp. v. United States, 282 U.S. 30.

The purposes of the Robinson-Patman Act, in strengthening Section 2 of the Clayton Act provisions regarding price discrimination, were to prevent sellers and sellers' brokers from yielding to the economic pressures of a large buying organization by granting unfair preferences in connection with the sale

of goods; to prohibit all devices by which large buyers gain discriminatory preferences over smaller ones by virtue of greater purchasing power; to protect small businesses which are unable to buy in quantity against competing operations of large interstate concerns, and to insure that purchasers from a single supplier are not injured by the supplier's discriminatory practices. Federal Trade Commission v. Sun Oil Co., 371 U.S. 505.

It is further submitted that the court below should have applied the anti-trust statutes, even though they were Federal.

In General Aniline & Film Corp. v. Bear Co., Inc., et al, 113 N.E.2d 844 (N.Y. 1953), the court essentially held that the mere fact that a defense was predicated on the Federal statutes did not in itself deprive the State court of jurisdiction to hear and pass upon it. See, also, Vendo Company v. Stoner, 245 N.E.2d 263 (Ill. 1969).

Similarly, in Berry Packing Corp., v. Packers Super-Markets, Inc., 225 N.Y.S.2d 691, it was held that a violation of the Clayton Act is a proper defense to an action by Seller for goods sold and delivered. In City Trade & Industries, Ltd. v. New Central Jute Mills Co., 250 N.E.2d 52 (N.Y.) and Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd., 315 N.Y.S.2d 897 (N.Y. 1970), defenses under the Federal anti-trust statutes were allowed to be raised and were entertained by State Courts. The Big Top Stores, Inc. decision, supra, was affirmed without an opinion at 318 N.Y.S.2d 924 (1971).

In the Big Top case, supra, the Court directly addressed itself to the same sort of situation involved at bar, i.e., where a party was seeking the aid of the state court in attempted involvement of a contractual provision, which, in and of itself, violated the Federal anti-trust laws. The state court did not hesitate to refuse to countenance the illegal contract and clearly distinguished that situation from those instances where anti-trust violations were not part and parcel of the plaintiff's claim.

Thus, at page 908 of the decision, the Court said:

> "It is the settled law of this State that a party to an illegal contract cannot ask a court of law to help him carry out his illegal object, nor can a person plead or prove, in any court a case in which as a basis for his claim, he must show his illegal purpose (Stone v. Freeman, 298 N.Y. 268, 271, 82 N.Ed.2d 571, 572)
>
> "Kelly v. Kosuga, 385 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 and similar cases relied on by plaintiff are readily distinguishable. They stand for the rule that a party to a contract may not avoid payment for goods sold and delivered to him on the ground that the contract of sale violates the federal anti-trust statutes by provisions thereof separable from the promise to pay. In such cases the plaintiff

is not required, in order to prove his case to disclose the illegality on the contract pursuant to which the sale was made. Here the plaintiff is asking the court to enforce the very provision of the franchise agreement which operates as an illegal restraint of trade."

Again, in New York Stock Exchange, Inc. v. Goodbody & Co., 345 N.Y.S.2d 58 (1973), at page 59, the Supreme Court, Appellate Division, First Department, reiterated the general law:

"A violation of federal antitrust laws may be asserted as a defense in a state action where the plaintiff, in order to prove a prima facie case, must also inevitably prove an illegal act (Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 29 S.Ct. 280, 53 L.Ed. 486; City Trade & Indus., Ltd. v. New Central Jute Mills Co., Ltd., 25 N.Y.2d 49, 302 N.Y.S.2d 557, 250 N.E.2d 52). However, where the antitrust violation is collateral to the main issue in the complaint, it cannot remain as a viable defense (Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475; Bruce's Juices v. American Can Co., 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219; Small v. Lamborn & Co., 267 U.S. 248, 45 S.Ct. 300, 69 L.Ed. 597; Refrigeration Sales Co. v. York Corp., 32 Misc.2d 231, 223 N.Y.S.2d 116, aff'd 18 A.D.2d 1140, 239 N.Y.S.2d 863."

The present factual situation is precisely that situation which this Court recognized as the exception to the general rule that anti-trust defenses are not cognizable in state court proceedings as set forth in Kelly v. Kosuga, 358 U.S. 516 (1959). Kelly, supra, did not hold that never was an anti-trust defense available in a contract; on the contrary, Kelly recognized that there are instances where the antitrust defense is available to an action on a contract. Admittedly, Kelly limited the situations where the defense is available, but it is submitted that the exception of Kelly is the case at bar: This is, that where it is alleged that the contract (note) attempted to be enforced is the direct result of unilateral conduct on the part of respondents, that violated the express mandate of § 1 of the Sherman Act, then it was not "a lawful sale for a fair consideration constituting an intelligent economic transaction in itself." Kelly, p. 521.

The language of Kelly, at page 520, supporting the exception applicable to the contention of petitioners' at bar, is:

> "In any event, an analysis of the narrow scope in which the defense is allowed in respect of the Sherman Act indicates that the principle of distinction is not what the petitioner claims it to be. The leading case here in which the defense was allowed is Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227.... The Court was of opinion that to give judgment for the excessive purchase

price so fixed in favor of such a vendor would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act .... Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it' .... Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation, cf. Bruce's Juices, Inc. v. American Can Co., supra, at 753-754, is avoided by treating the defense as so confined."

If the fact finder accepted Azalea's evidence that the note was the product of a threatened group boycott, then denying that defense and allowing recovery on the note "would be to make the courts a party to the carrying out of one of one of the very restraints provided by the Sherman Act."

III. The Court below violated petitioners' Constitutional Rights in denying petitioners' request for trial by jury on the factual issues where the purported waiver to such right to trial by jury was contained in an allegedly void instrument and was obtained in violation of petitioners' rights under the Seventh Amendment to the Constitution of the United States.

The Seventh Amendment to the Constitution of the United States provides:

> ". . .[I]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Virginia Bill of Rights also preserves the right to trial by jury, and this precious and sanctified right is set forth in Article I, Section 2:

> ". . . [I]n controversies respecting property and in suit between man and man, trial by jury is preferable to any other, and ought to be held sacred . . . ."

In the instant case, petitioners were denied their sacred right to trial by jury. The note being sued upon contained a contractual clause purporting

to be a waiver by petitioners of their right to trial by jury ". . . in any law suit . . . based upon or arising out of any claim of default in payment of this note . . . .". The Trial Court below, while referring to the above clause, struck petitioners' request for trial by jury. Petitioners submit that this was error for the following reasons:

A. THE WAIVER CLAUSE IS INAPPLICABLE SINCE PETITIONERS RAISED DEFENSES WHICH CHALLENGED THE VALIDITY OF THE ENTIRE INSTRUMENT CONTAINING THE CLAUSE.

In their initial responsive pleadings in the Trial Court below, petitioners alleged that the note being sued upon was executed under duress (as a question of Virginia common law). This defense of common law duress and the antitrust defenses go directly to the invalidity of the entire note, including the waiver clause, since the degree of duress and the magnitude of the antitrust violations alleged by petitioners are both sufficient to render the entire note null and void.

In Federal Housecraft, Inc. v. Faria, 28 Misc. 2d 155, 216 N.Y.S.2d 113 (1961), the Court held that the defendants were entitled to a jury trial on the defense that they were fraudulently induced to enter into a contract with the plaintiff, even though the contract contained a provision for a jury waiver. See also, Gotham Credit Corp. v. Brancaccio, 83 N.Y.S.2d 341 (1938). The

court in Federal Housecraft refused to apply the jury waiver since the validity of the waiver clause, together with the rest of the contract, was placed in doubt by the defense.

The defense of duress also places the note in the instant case in serious doubt. Va. Code Ann. §8.3-305(2)(b) (Repl. Vol. 1965), expressly includes "duress" as a "real defense", such as to render an entire obligation a "nullity". While the Comment to §8.3-305 states that "duress is a matter of degree", the amount of duress alleged by petitioners clearly rises to the status of a "real defense". Petitioners submit that the evidence in this suit clearly shows: (1) that respondents held themselves out to petitioners as representing the nation's largest motion picture distributors, controlling approximately 75% of that business; (2) that if petitioners refused to execute the note in question, respondents threatened to cause or induce these motion picture distributors to withhold and refuse the use and rental of motion picture films; and (3) that the refusal or withholding of these films would be unfavorable, and probably fatal, to petitioners' business interests as local motion picture exhibitors.

Thus, respondents figuratively placed a gun at petitioners' heads in order to procure execution of the note in question, together with the jury trial waiver therein. The court in Federal Housecraft, supra, has cogently summarized the reason for refusing to

apply waiver clauses of such doubtful validity: ". . . [the defendant] would be at a disadvantage in having to proceed to trial without a jury by virtue of the waiver provision in an agreement which may be void in its entirety for want of legal consent." 216 N.Y.S.2d at 114.

B. THE WAIVER CLAUSE IS UNCONSCIONABLE AND VOID AS A MATTER OF LAW

Section 2-302(1) of the Uniform Commercial Code, codified at Va. Code Ann. §8.2-302(1) (Add. Vol. 1965), provides that:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. Id.

While §2-302 is set forth in the "sales" portion of the Code, the section is considered to be a concise embodiment of the principles of "good faith" and "commercial reasonableness" which govern all commercial transactions under the Code. See Va. Code Ann. §8.1-102; see generally, Leff, Unconscionability and the Code -- the Emperor's New Clause, 115 V.Pa.L.Rev. 485 (1967); Ellinghaus,

In Defense of Unconscionability, 78 Yale L.J. 759 (1969). Moreover, the courts have generally considered §2-302 to simply be a statutory embodiment of earlier principles of equity and common law. See, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (§2-302, as an embodiment of common law, applied to contracts made before enactment of the U.C.C.); David v. Manufacturers Hanover Trust Co., 55 Misc. 2d 1080, 287 N.Y.S.2d 503 (1968) (§2-302 applied to jury waiver clause in a bank account "signature card").

In the instant case, petitioners assert that §8.2-302 of the Code of Virginia precludes enforcement of the jury waiver clause in the note being sued upon. In support of this assertion, petitioners submit that: (1) the waiver clause is procedurally unconscionable because petitioners were given no meaningful choice or opportunity to bargain when compelled to accept the clause; (2) the waiver clause is substantively unconscionable because the deprivation of petitioners' right to trial by jury cannot be reasonably justified in light of the general commercial needs of respondents' particular trade; and (3) the waiver clause is generally unconscionable because it is not supported by consideration.

The Walker-Thomas case, supra, as the leading authority on unconscionability under the U.C.C., sets forth the following two-part test:

> Unconscionability has generally been recognized to include

> an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. 350 F.2d at 450.

In other words, unconscionability results where one party employs a vastly superior bargaining position to bludgeon the other party (procedural unconscionability) into accepting an unfavorable contract term which is not commercially reasonable (substantive unconscionability).

Procedural unconscionability often exists where one party has merely taken advantage of the other party's ignorance: Walker-Thomas, supra (party's lack of education); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966), reversed in part on other grounds, 54 Misc.2d 119, 281 N.Y.S.2d 964 (1967) (party's unfamiliarity with English language); David v. Manufacturers Hanover Trust Co., 55 Misc. 2d 1080, 287 N.Y.S.2d 503 (1968) (party's unfamiliarity with "maze of fine print"). In addition, procedural unconscionability was found in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69 (1960), where a party was afforded no opportunity to bargain against a warranty disclaimer, and in Campbell Soup Co. v. Wenz, 172 F.2d 80 (3rd Cir. 1948), where a large canning company exerted its buying power so as to force small farmers to accept unfavorable contract terms. In the instant case, procedural unconscionability results not

only from respondents' superior bargaining position, but from petitioners' gross abuse of their position. As mentioned in Part III above, respondents threatened petitioners with economic ruin in order to obtain from petitioners a promissory note and waiver of petitioners' right to trial by jury. Petitioners were clearly in no position to bargain for more favorable terms.

Substantive unconscionability exists where an overpowering party obtains inordinately powerful remedies or terms: Campbell Soup, supra, (buyer obtained ridiculously low contract price and unreasonable delivery requirements); Frostifresh, supra (seller obtained excessive price and charges); Walker-Thomas, supra (with each new sale, seller acquired a security interest in previously purchased goods). More important, substantive unconscionability also exists where an overpowering party deprives a weaker party of fundamental rights or remedies: Henningsen, supra (buyer deprived of sales warranty); Fuentes v. Shevin, U.S. , 40 U.S.L.W. 4692, 4700-4701 (1972) (buyer compelled to accept pre-judgment replevin provision, was deprived of due process of law). Indeed, in David v. Manufacturers, supra, the court found that the contractural deprivation of a weaker party's right to trial by jury was substantively unconscionable. In so finding, the court reasoned that:

> As the right of jury trial is fundamental, courts indulge every reasonable presumption against

waiver. 287 N.Y.S.2d at 509, citing Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 811; 73 ALR2d 1337; 31 Am.Jur. §44 at 48.

Inasmuch as respondents in the instant case have abused their vastly powerful bargaining position so as to contractually deprive petitioners of a fundamental right, the holding in David, supra, provides clear authority for this court to apply Virginia Code §8.2-302 in refusing to enforce the waiver clause. The commercial setting of the motion picture business, wherein the note and clause were executed, provides no reasonable justification for depriving petitioners of their right to trial by jury. There was nothing inherently complicated or difficult about the factual issues presented in this case.

Moreover, the absence of any valuable consideration provides even further indication that the waiver clause is unconscionable. Under any construction of the facts of this case, the only valuable consideration petitioners received for their note was release of a pre-existing debt (although petitioners still contend that they did not even receive this). Respondents claim that the note was given in satisfaction of the alleged debt, but respondents compelled petitioners to give even more -- their right to trial by jury -- for which petitioners received nothing in return.

In light of all the foregoing,

petitioners submit that the jury waiver clause is unconscionable and void as a matter of law. The clause would be unenforceable in any jurisdiction having enacted §2-302 of the Uniform Commercial Code. The clause is even less deserving of enforcement in Virginia because Article I, §11 of the Constitution of Virginia states:

> "That in controversies, respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."

Moreover, the waiver clause represents a substantial infringement of rights guaranteed to petitioners by the Seventh Amendment to the Constitution of the United States.

CONCLUSION

Petitioners respectfully request that this Court grant a writ of certiorari for the above reasons.

Respectfully submitted,

AZALEA DRIVE-IN THEATRE, INCORPORATED and TWIN DRIVE-IN THEATRE, INC.

By /s/ Stanley E. Sacks
Stanley E. Sacks,
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CERTIFICATE OF SERVICE

I, Stanley E. Sacks, counsel for petitioners in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 11th day of September, 1975, I mailed three copies of the foregoing Petition for Writ of Certiorari to Lewis T. Booker, Esq. and Benjamin C. Ackerly, Esq., Hunton, Williams, Gay & Gibson, P. O. Box 1535, Richmond, Virginia 23212, counsel of record for respondents.

/s/ Stanley E. Sacks
Stanley E. Sacks

APPENDIX

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APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 13th day of June, 1975.

Azalea Drive-In Theatre, Incorporated, et al.,

Plaintiffs in error.

against Record No. 740472

Edward A. Sargoy, et al., etc.,

Defendants in error.

Upon a Petition for Rehearing

On mature consideration of the petition of the plaintiffs in error to set aside the judgment rendered herein on the 28th day of April, 1975, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste: H. G. Turner, Clerk

al

APPENDIX B

Present: All the Justices

AZALEA DRIVE-IN THEATRE, INCORPORATED,
and TWIN DRIVE-IN THEATRE, INC.

-v- Record No. 740472

EDWARD A. SARGOY, JOSEPH L. STEIN
and BURTON H. HANFT, d/b/a SARGOY,
STEIN & HANFT (a partnership)

OPINION BY CHIEF JUSTICE LAWRENCE W. I'ANSON
Richmond, Virginia, April 28, 1975

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK
Edward L. Ryan, Jr., Judge

Plaintiff, Sargoy, Stein & Hanft (Sargoy), instituted this action against defendants, Azalea Drive-In Theatre, Incorporated, and Twin Drive-In Theatre, Inc. (defendants), to obtain a judgment on a promissory note dated February 12, 1971, in the amount of $70,000, together with interest and a reasonable attorney's fee. Defendants filed a responsive pleading and numerous affirmative defenses, one of which alleged that the note was void because it was procured in violation of the Sherman Anti-Trust Act and the Robinson-Patman Act. Defendants also filed a counterclaim for treble damages based upon alleged violations of these two antitrust acts.

Sargoy moved to strike defendants' affirmative defense based upon the federal antitrust laws because such defense was not available in this State court action. Sargoy also filed a plea in abatement to defendants' counterclaim asserting that federal district courts have exclusive jurisdiction to entertain federal antitrust actions. The motion to strike and the plea in abatement were sustained by the trial court.

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Defendants' request for a jury trial was denied by the trial court because the note sued on provided that the right to a jury trial was waived by defendants in any litigation resulting from a default on the note.

After hearing evidence, the trial judge stated in an opinion letter that the legal issues presented turned on issues of fact and, as the trier of fact, he was resolving the issues in favor of Sargoy. Judgment was accordingly entered for Sargoy for the full amount of the note, together with interest and attorneys' fees.

The evidence shows that Earnest H. Price was the sole stockholder and operator of the Azalea and Twin Drive-In Theatres, located in Norfolk, Virginia. Films for the two drive-ins were rented from nine major distributors, who represented at least 75% of the total motion picture distribution companies in the country. The standard rental fee was 40% of the paid admissions less sales tax. To ensure that the total admissions were accurately reported by the drive-ins (commonly known as exhibitors in the industry), the rental contracts contained a clause permitting the distributors or their agents to audit the exhibitors' records.

In November 1970 Sargoy, a New York law firm representing the nine distributors, notified defendants that it was sending Philip Kornfeld, an auditor, to Norfolk to audit the records of the two theatres. After an audit of the accounts covering a five-year period, Kornfeld came to the conclusion that defendants had underreported admissions in the sum of $220,000.

Kornfeld arrived at this figure by comparing concession receipts to admissions on those nights when defendants knew

admissions were being independently counted. The concession receipts were approximately 43.5% of the admission receipts when defendants knew they were being checked. However, on nights when "blind checks" were conducted, the percentage of concession receipts to admissions varied from 55% to 75%, indicating that not all of the admissions had been reported.

Another indication that there was underreporting was that the national average of persons per car entering a drive-in theatre was 2.2. Defendants' records did not reflect this national average.

At a meeting held on February 12, 1971, Kornfeld advised both Price and his accountant, Carl J. Katz, what his audit showed and told them that the unreported admissions represented a claim against defendants in the amount of $88,000.

Price and Katz testified that they questioned the accuracy of Kornfeld's figures, but they said Kornfeld told them that, if defendants did not agree to a settlement that day, defendants would not receive any more films. Kornfeld repeatedly denied making this threat.

Price and Katz then held a private conference and decided that it would be best for Price to accept some form of agreement to avoid having his film supply cut off, which would put the theatres out of business. A compromise figure of $70,000 was finally agreed upon with Kornfeld. At this time Price, as president of the two corporations, signed a note payable to Sargoy in the agreed amount. The note was to be paid over a three-year period and the first payment was due June 1, 1971. Two $7,500 checks were to be held in escrow for the first payments on the note.

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Kornfeld then asked Price to sign a settlement agreement which purported to release any further claims against defendants arising out of the audit period ending on December 31, 1970. Price stated that he wanted his attorney to review the agreement before he signed it. Kornfeld agreed to this and asked Price to mail the agreement to him after his attorney had read it and Price had signed it for the corporations.

The settlement agreement provides, in pertinent part:

> "In order to settle and resolve the questions and controversies between the Exhibitor and each respectively of said Distributors involving or in any way connected with each and any said Released Theatre(s), and to effect a mutual exchange of releases as to Released Theatre(s) between the Exhibitor and each said respective Distributor, in the content and form of the accompanying Schedule A (which is the typical form of mutual exchange of release contemplated by this agreement), it is mutually agreed as follows:
>
> ....
>
> "4. Upon confirmation of acceptance it is further mutually agreed that the Exhibitor shall be deemed to have entered into and effected a mutual exchange of release with each separately of the above named Distributors, in the form of the accompanying Schedule A which is made a part hereof for such purposes ....
>
> ....
>
> "8. IN WITNESS WHEREOF, this offer of settlement has herewith been executed by the Exhibitor, which upon confirmation by Sargoy & Stein of acceptance hereof as above provided, shall be deemed to be the settlement agreement of the respective parties hereto, with the effective release date hereof for the purpose of the releases provided herein being the day preceding the 31st day of December 1971." (Date handwritten.)

Kornfeld later discovered that he had mistakenly written the effective release year as 1971 in the agreement instead of 1970. He said that he called Katz on the telephone and informed him of the mistake and that Katz stated that he would see to it that the date was changed. Katz denied receiving any such call from Kornfeld.

Kornfeld delivered the note and two $7,500 checks to David Fallick, his superior, in New York. Fallick testified that one of the dates on the checks had been changed and suggested that Kornfeld get a replacement from Price. On March 1, 1971, Fallick received, and acknowledged receipt of, the settlement agreement signed by Price, as president of the corporations, and the revised check.

Upon examination of the settlement agreement, Kornfeld noticed that the date of the effective release on the agreement had not been changed from 1971 to 1970, as he had requested Katz to do. Kornfeld then changed the date himself.

After receiving the settlement agreement, Fallick sent letters to all nine distributors asking them if they would accept a certain percentage of the $70,000 in settlement for their claims. Written acceptances were received from seven distributors and oral acceptances from the remaining two.

Burton H. Hanft, attorney for Sargoy, testified that he signed the settlement agreement on behalf of the distributors. He stated that plaintiffs had been the attorneys and agents for the nine distributors for the past thirty years; that all the distributors had given him the authority to accept the settlement agreement in this particular case; and that he had communicated this authority to defendants.

On April 2, 1971, Fallick wrote a letter to Price informing him that the distributors had accepted the agreement. He enclosed a separate mutual release from each distributor for Price to sign and return. On May 3, 1971, Fallick again wrote Price asking him to sign and return the releases. He received no response from Price.

The next word that Fallick received on the matter was a phone call and a letter from defendants' attorney three days before the first instalment on the note was due, stating that defendants did not intend to go through with the settlement and that a "stop payment" order had been placed on the two checks.

Defendants' first contention is that the trial court erred in striking its affirmative defense based upon violations of the Sherman Anti-Trust Act and the Robinson-Patman Act. They argue that the note was unenforceable because it was illegally procured under threat of refusing to supply them with films in violation of the federal antitrust acts. We do not agree.

This issue has been resolved against defendants by the United States Supreme Court in the cases of Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947), and Kelly v. Kosuga, 358 U.S. 516 (1959). In Bruce's Juices the vendor of canned goods brought suit against the buyer, Bruce's Juices, Inc., to recover on several renewal notes upon which the buyer had defaulted in payment. The buyer alleged that the notes were illegal and void because the vendor discriminated against it in violation of the Robinson-Patman Act.

The sole issue to be decided by the Court was "whether renewal notes representing the purchase price of goods sold and delivered are uncollectible if it is found that the vendor violated the Robinson-Patman Act ...." Bruce's Juices, supra, 330 U.S. at 744. In affirming the decision of the Supreme Court of Florida in favor of the plaintiff, American Can Co., the Court stated:

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> "If, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover. Here, however, what the plaintiff must show is the notes which import consideration. If consideration is denied, he can prove that cans were sold and delivered at a stated price. That is no violation of law. It is only when the court goes outside of the dealings between plaintiff and defendant and it is proved that the same kind of cans were sold to others at different prices within a relevant period of time, amounting to a discrimination ... that the basis of the defense asserted here appears." Id. at 756. (Footnote omitted.)

The Court further stated that, if defendant could actually prove its charge, it could sue the plaintiff for treble damages under the Robinson-Patman Act. However, any such claim, whether in the form of a motion for judgment or a counterclaim, is within the exclusive jurisdiction of the federal district courts and cannot be entertained by a state court.

The Supreme Court stated the rationale behind this rule in Kelly v. Kosuga, supra, in which it affirmed a district court in striking a defense, based upon the Sherman Anti-Trust Act, to a suit for the collection of the purchase price for fifty train carloads of onions. There the Court stated:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court .... In D. A. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165 .... '[t]he Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction .... Obviously, state law governs in general the rights and duties of sellers and purchasers of goods, and, while the effect of illegality under a federal statute is a matter of federal law, ... still the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act. [Citations omitted.]
>
> ....
>
> "Accordingly, while the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can

> hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price .... [W]here, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question." 358 U.S. at 518-19, 521. (Footnote omitted.)

See also Medusa Corporation v. Gordon, 496 F.2d 249 (6th Cir. 1974); Response of Carolina v. Leasco Response, Incorporated, 498 F.2d 314 (5th Cir. 1974); Appalachian Power Company v. Region Properties, Inc., 364 F.Supp. 1273, n. 11 at 1278 (W.D.Va. 1973); N.Y.Stock Exchange, Inc. v. Goodbody & Co., 42 A.D.2d 556, 345 N.Y.S.2d 58 (1973); Polycast Technology Corporation v. Rohm & Haas Company, 305 A.2d 323 (Del. 1973). Cf. Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd., 315 N.Y.S.2d 897 (N.Y.Sup.Ct. 1970).

In the instant case, the amount of the note represented a compromise of the amount found to be due on account of unreported admission receipts. For Sargoy to make out a prima facie case on the promissory note, the genuineness of the signatures being admitted by defendants, it needed only to produce the instrument. This entitled Sargoy to recover in the absence of any further evidence or defense established by defendants. Code § 8.3-307(1); Cox v. Parsons, 165 Va. 575, 577, 183 S.E. 440, 441 (1936); Holdsworth v. Anderson Drug Co., 118 Va. 359, 361, 87 S.E. 565, 566 (1916). The alleged federal antitrust violation was collateral to the main issue in plaintiff's motion for judgment, and it was not a viable defense in this action. Here, the enforcement of the promissory note in no way furthers the alleged illegal activity of Sargoy and the distributors.

Defendants contend that the trial court erred in denying them a jury trial because the note was illegally procured under a threat to cut off their film supply in violation of the federal antitrust laws, and that the jury waiver provision in the note suffers the same infirmity as the note itself.

The validity of a provision in an instrument waiving a jury trial, made independently of pending litigation, has been upheld in a great number of cases. However, the jury waiver provision has been held to be invalid when the instrument in which it is contained is void. 47 Am.Jur.2d, "Jury," § 86 at 700 (1969). See also Annot., "Contractual Waiver of Jury Trial," 73 A.L.R.2d 1332, 1336.

Since the provision in the note waived a jury trial, and we have held that in the present case the alleged violation of the federal antitrust laws is not a viable affirmative defense to this action on the note, we hold that the trial court did not err in denying the defendants' motion for a trial by jury.

Defendants next contend that their offer of settlement was contingent upon the nine distributors executing separate releases with the defendants, which was never done. Thus they argue that their offer of settlement was never accepted. We do not agree.

Paragraph 4 of the settlement agreement is clear and unambiguous. It provided that upon acceptance of the settlement agreement by the distributors defendants "shall be deemed to have entered into an effective and mutual exchange of release with each" of the distributors.

The evidence shows that the settlement agreement was signed by defendants and received by Sargoy on March 3, 1971. It was accepted by the distributors pursuant to Fallick's letter of April 2, 1971. Consequently, the settlement agreement, in accordance with its terms, became binding on all the parties without the execution of the releases. Moreover, defendants cannot now complain that they did not receive releases from the distributors because they never returned them for the signatures of the distributors or their authorized agents.

Defendants assigned other errors which were not urged in oral argument before us. However, we have considered the alleged errors and find no merit in any of them. Most of those alleged errors were based on factual issues and, since there is evidence to support the findings of the trial court, a discussion of them would serve no useful purpose. See White and P & W Oil Co. v. Perkins, 213 Va. 129, 134, 189 S.E.2d 315, 319 (1972); Spence v. Spence, 212 Va. 431, 435, 184 S.E.2d 763, 765-66 (1971).

For the reasons stated, the judgment of the court below is

Affirmed.

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APPENDIX C

§ 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1970)

§ 1. Trust, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of

minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX D

§ 2-302 of the Uniform Commercial Code, codified as § 8.2-302 (1) of the Code of Virginia (1965 Added Volume)

§ 8.2-302. Unconscionable contract or clause.-(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.
(1964, c.219.)

APPENDIX E

§ 3-305 of the Uniform Commercial Code, codified as § 8.3-305 of the Code of Virginia (1965 Added Volume)

§ 8.3-305. Rights of a holder in due course.-To the extent that a holder is a holder in due course he takes the instrument free from

(1) all claims to it on the part of any person; and

(2) all defenses of any party to the instrument with whom the holder has not dealt except

(a) infancy, to the extent that it is a defense to a simple contract; and

(b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and

(c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and

(d) discharge in insolvency proceedings; and

(e) any other discharge of which the holder has notice when he takes the instrument. (Code 1950, §§ 6-367, 6-368, 6-409; 1964, c. 219.)

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-387

AZALEA DRIVE-IN THEATRE, INCORPORATED AND TWIN DRIVE-IN THEATRE, INC.,
Petitioners,

v.

EDWARD A. SARGOY, JOSEPH L. STEIN AND BURTON H. HANFT, D/B/A SARGOY, STEIN & HANFT, A PARTNERSHIP,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING THE PETITION

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October 9, 1975

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Respondents, hereafter referred to as Sargoy, oppose the petition for a writ of certiorari sought by Petitioners, hereafter referred to as Azalea, to review the judgment of the Supreme Court of Virginia in this case.

I.

QUESTIONS PRESENTED

Sargoy disagrees with the statement of the questions presented in Azalea's petition and accordingly restates them.

1. Should this Court review a determination of fact made upon contested evidence by the Circuit Court of the City of Norfolk, Virginia, and affirmed by the Supreme Court of Virginia?

2. Should this Court overturn its decision in *Kelly* v. *Kosuga,* 358 U.S. 516 (1959) and order a state court to take cognizance of a federal antitrust defense and counterclaim to a state contract action?

3. Should this court review a determination of Virginia law—waiver of trial by jury—made by the Supreme Court of Virginia?

II.

STATEMENT OF THE CASE

A.

The Proceedings Below

This action was originally instituted by Sargoy against Azalea in the Circuit Court of the City of Norfolk, Virginia, on November 12, 1971, to recover upon a defaulted promissory note in the amount of $70,000.00 plus interest and attorneys' fees. The note was taken in compromise of a claim for film rentals due Sargoy's clients, a number of motion picture distributors, for Azalea's deliberate failure fully to report gross receipts.

Azalea pled that the note was unenforceable as a matter of state common law because it had been obtained by duress and coercion, and because it lacked consideration. Azalea also pled that the note was unenforceable because it was obtained by duress and coercion in violation of the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Antitrust Act. In addition Azalea filed an antitrust counterclaim in the state court pursuant to Section 4 of the Clayton Antitrust Act.

The trial court, relying upon this Court's decision in *Kelly* v. *Kosuga,* 358 U.S. 516 (1959), struck the antitrust allegations as an affirmative defense and sustained a plea in abatement to the antitrust counterclaim. The trial court then heard the case without a jury on the defenses, among others, of duress and coercion and lack of consideration. Azalea fully availed itself of the ample opportunity given it by the trial court to put on all the evidence it could muster in support of its defense that it had executed the note under duress and coercion.

After a two day trial and extensive postrial briefs, the trial court in a letter opinion dated January 4, 1974, found in favor of Sargoy. The trial court said:

> Gentlemen:
>
> There is no need for the Court to state the facts, as these have been adequately stated in the comprehensive briefs filed by counsel for the parties. However, the following interesting points of law are raised by the pleadings and the evidence:
>
> 1. Was there sufficient consideration to support the contractual agreement?
>
> 2. Was there sufficient and convincing evidence of duress on the part of the plaintiffs to the detriment of the defendants?
>
> 3. Was there a binding contract between the parties?
>
> 4. Was there a counteroffer made by plaintiffs to defendants which has never been accepted by the defendant? Or was the agreement amended only to conform to the prior agreement of the parties?
>
> Counsel have cited to the Court an abundance of case law and other authorities. The Court concludes that the authorities cited by the plaintiff are more persuasive, considering the peculiar facts and circumstances of the case. In addition, it seems that to a broad degree the issues of law outlined above turn on issues of fact.

As the trier of the facts, the Court decides same in favor of the plaintiffs.

Azalea then appealed that decision to the Supreme Court of Virginia. Among Azalea's assignments of error for review by that court were:

> 7. The Court erred in refusing to permit and allow defendants to interpose and utilize as a legal defense to the Motion for Judgment the various anti-trust laws of the United States of America, generally and specifically the Sherman Anti-Trust Act and the Robinson-Patman Act, and denying the defendants the right to interpose as a defense the illegality of the acts and transactions of plaintiffs that were relied upon as a basis for their Motion for Judgment.
>
> * * *
>
> 12. The Court erred in finding that the note and offer of settlement by defendants, made on February 12, 1971, and thereafter were not made under and as a direct result of coercion and duress.

The opinion of the Supreme Court of Virginia set forth in Azalea's petition held that the trial court had correctly followed this Court's decision in *Kelly* v. *Kosuga,* above, in refusing to consider the antitrust defenses and antitrust counterclaim in a state court action to enforce a promissory note. The Supreme Court of Virginia also considered Azalea's contention that the trial court had erred in its finding of fact that the promissory note at issue had not been obtained as a result of coercion and duress. That court said, at p. 11 of Azalea's petition:

> "Defendants assigned other errors which were not urged in oral argument before us. However, we have considered the alleged errors and find no merit in any of them. Most of those alleged errors were based on

> factual issues and, since there is evidence to support the findings of the trial court, a discussion of them would serve no useful purpose [citations omitted]."

B.

The Conflicting Evidence In The Trial Court

Perhaps the one most crucial issue tried in the state court was whether Azalea had given the promissory note in issue as the result of a statement by Philip Kornfeld, an employee of Sargoy, that if the note were not given Azalea would not be furnished motion picture films by the distributor clients represented by the Sargoy law firm. The Sargoy firm did indeed represent nine motion picture distributors in their attempt to collect film rentals due them from Azalea. It is also true that Sargoy, as noteholder and attorney for its clients took the promissory note in compromise settlement of the claims for film rentals.

One reads Azalea's petition in vain to find any real suggestion that there was a contest as to whether the so-called threat was made. Azalea simply asserts that the overwhelming evidence is that the threat was made (Petition, p. 12).

Mr. Kornfeld did in fact testify, upon cross-examination, unequivocally and repeatedly that he made no such threat at all:

> "Q. All right. Now, Mr. Kornfeld, isn't it true that you told Mr. Price, in Mr. Katz's presence, that if he didn't pay an amount of money that was satisfactory to your principals or to Mr. Fallick back up in New York whom you were reporting to, he wasn't going to get any more pictures?
>
> A. That is not so.
>
> Q. You deny that?
>
> A. I do.

Q. All right, sir. That never came up?

A. No sir.

Q. You are sure?

A. I am positive.

* * *

Q. Well, before we get to that—incidentally, hadn't you threatened to accuse Mr. Price of fraud in this during this last session with them? Before he agreed to sign a note for you, didn't you bring up fraud?

A. No, sir.

Q. Didn't you tell him that the companies will contend fraud?

A. Mr. Sacks on January 15th—Mr. Sacks, you asked me a question.

Q. Right.

A. On January 15th, during the meeting then Mr. Katz said to me that the statute in this case would apply. This will be limited—limit the claim to a three years' period. And I said no, the companies will not be balked by the statute of limitations in a case like this because they will contend that there is a fraud.

This was no charge. This was saying it merely as a defense to instituting the statute of limitations.

* * *

Q. Wasn't that part and parcel of what you had told them? 'Listen. If I don't take something back to New York, you are not going to get any more film'?

A. No, sir, that is not so.

* * *

Q. Now, you tell us today that you didn't say to them, 'I have to have something to go back to New York with tonight'? You didn't say that?

A. No, sir.

Q. You remember that you didn't say that?

A. I have never said that to any exhibitor at any time.

* * *

Q. Didn't you tell him that in addition to his getting films from everybody by signing a note, you all would see that everything went back to normal with the other distributors?

A. No, sir, I never did say that.

Q. You deny that?

A. I do.

Azalea's petition is full of other errors and inaccuracies in conflict with the record. For example, Sargoy never contended, as Azalea asserts at page 5 of the petition, that Azalea owed $240,000.00 for underreported admission receipts. Sargoy originally claimed $88,000.00, ultimately compromised at $70,000.00. However, those numerous distortions and inaccuracies have been put to rest by the decision of the Supreme Court of Virginia, so they will not be answered in detail here.

III.

ARGUMENT

A.

This Court Should Not Grant A Writ Of Certiorari To Review A Finding Of Fact By A Trial Court Duly Affirmed By The Highest Court Of Record Of That State.

Azalea's petition argues that there was sufficient evidence of coercion, if the testimony of Mr. Price, Azalea's president, be believed, so that the trial court and the Supreme Court of Virginia both erred in finding that Azalea had not been coerced into executing the promissory note at issue here. As the trial court's opinion indicates, the trial court chose to believe Mr. Kornfeld's denial that he ever made any threat rather than Mr. Price's conflicting testimony. In-

deed, Mr. Price's testimony is effectively conceded to be contradictory by Azalea itself in its petition at page 13. The Supreme Court of Virginia considered that conflicting testimony and it concluded that there was sufficient evidence to support the trial court's findings.

Now Azalea invites this Court to review the evidence once again and, contrary to the trial court and the Supreme Court of Virginia, conclude that Azalea was indeed coerced into signing the note. That is an invitation this Court has consistently declined to accept, and Azalea shows no reason why it should be accepted this time.

In *Berenyi* v. *Immigration Director,* 385 U.S. 630 (1967) this court discussed its role in reviewing disputed issues of fact. It said, pp. 635, 636:

> "The petitioner asks us to reject as 'clearly erroneous' the factual conclusion about his party membership reached by the District Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard the Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. [Citation omitted].
>
> * * *
>
> "The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force. . . ."

That language is tailored to this case. Here two courts, the Circuit Court of the City of Norfolk and the Supreme Court of Virginia, have reviewed factual issues and have

resolved them in favor of Sargoy. Here, Judge Edward L. Ryan, Jr., of the Circuit Court of the City of Norfolk heard and observed Messrs. Price and Kornfeld on the stand and chose to believe Mr. Kornfeld that there had been no coercion. As the two-court rule had particular force in the *Berenyi* case, it has here. The writ should not be granted to review a contested issue of fact already twice resolved against Azalea.

B.

The Courts Below Properly Applied This Court's Decision In Kelly v. Kosuga.

With the fact that no coercion was applied to it established, Azalea's contention that the trial court and the Supreme Court of Virginia erred in failing to permit it to raise an antitrust counterclaim under the laws of the United States is singularly without merit.

The trial court and the Supreme Court of Virginia, relying upon the decision of this Court in *Kelly* v. *Kosuga,* 358 U.S. 516 (1959), held the defenses and counterclaim inapplicable upon the ground that only where the note itself was an antitrust violation could the antitrust defenses be made.

Kelly v. *Kosuga* involved a suit for payment of the purchase price of 50 cars of onions. The defendant there sought to defend upon the ground that the sale was made pursuant to and was an indivisible part of an agreement which violated Section 1 of the Sherman Act. This Court, in affirming the action of the trial court in striking that defense, said, at page 521:

> ". . . where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though

> it furnished the occasion for a restrictive agreement of the sort here in question."

Just as in *Kelly* v. *Kosuga* a lawful sale of onions for a fair consideration constituted an intelligible economic transaction in itself, so here the promissory note given for what both the trial court and the Virginia Supreme Court have found to be as good and valuable is the same kind of intelligible economic transaction. As such it should be accorded the same dignity and freedom from antitrust attack as was the sale in *Kelly* v. *Kosuga*.

The New York decisions cited by Azalea in its petition are not in point. The contracts there sought to be enforced contained within their very provisions a violation of the antitrust laws. By enforcing the contract the court would be aiding a violation of the laws.

Typical of those cases is *Big Top Stores, Inc.* v. *Ardsley Toy Shoppe, Ltd.*, 315 N.Y.S.2d 897 (N.Y.Sup.Ct. 1970). There the plaintiff sought to enforce a contract which contained in its terms an illegal tying arrangement. Far from being in conflict with *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), upon which both the trial court and the Supreme Court of Virginia relied, the court there distinguished the *Kelly* case by pointing out that in the *Big Top* case the court's enforcement of the contract would itself perpetrate an illegality. As the court said, at page 908:

> "Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed. 2d 475 and similar cases relied on by plaintiff are readily distinguishable. They stand for the rule that a party to a contract may not avoid payment for goods sold and delivered to him on the ground that the contract of sale violates the federal antitrust statutes by provisions thereof separable from the promise to pay. In such cases the plaintiff is not required, in order to prove his case to disclose the illegality of the contract

> pursuant to which the sale was made. Here the plaintiff is asking the court to enforce the very provision of the franchise agreement which operates as an illegal restraint of trade."

None of the other cases cited by Azalea at pages 20-22 of the petition are even remotely relevant to this action. Without distinguishing them all, a typical opinion is *General Aniline and Film Corp.* v. *Bayer Co.* 305 N.Y. 479, 113 N.E.2d 844 (N.Y. 1953). All that opinion holds is that an antitrust consent decree in another action is not a bar to an action for breach of contract. The other cases cited by Azalea are even less relevant.

Kelly v. *Kosuga*, above, is not an aberration out of the mainstream of American jurisprudence. To the contrary, it logically follows this Court's holding in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947). There this Court first held that a defense that a commercial transaction violated the antitrust laws would not be permitted in a state court action based upon that transaction.

Kelly v. *Kosuga* has been consistently followed by the several Courts of Appeal since it was decided. Thus, in *El Salto, S.A.* v. *PSG Co.*, 444 F.2d 477 (9th Cir. 1971) the court ruled that a defendant could not assert a violation of the Robinson-Patman Act as a defense to a common law contract action, saying, at p. 482:

> "The Supreme Court has ruled that a Sherman Act violation is not an affirmative defense to a contract suit, even when the violation is inherent in the contract sued upon, so long as judicial enforcement of the contract would not be enforcing the precise conduct made unlawful by the Act [citations omitted]."

Certainly the mere enforcement of the promissory note here did not enforce conduct violative of the federal antitrust laws.

And the language of the court in *Medusa Corporation* v. *Gordon,* 496 F.2d 249 (6th Cir. 1974), following *Kelly,* is peculiarly applicable in this case, at p. 252:

> "If the purported oral agreement is violative of antitrust laws, an issue we do not here decide, the remedy lies in antitrust litigation under appropriate statutes, not in avoidance of a just debt."

Kelly v. *Kosuga* is, as the Virginia Supreme Court and the trial court have already determined, dispositive of Azalea's antitrust claim unless this Court is ready to re-examine the rationale which guided it in deciding *Kelly* v. *Kosuga.* We submit there is no reason for re-examining a rule well understood and consistently applied by lower courts.

C.

Azalea Was Not Improperly Denied Trial By Jury

Azalea contends it was improperly denied trial by jury even though Azalea's waiver of trial by jury was contained in the promissory note it executed. In its opinion, though, the Supreme Court of Virginia held that such waiver clauses have been upheld in a large number of cases.

Azalea also asserts that § 8.2-302(1) of the Code of Virginia (Virginia's version of the Uniform Commercial Code) authorizes a court not to enforce an unconscionable clause in a contract although otherwise enforcing the contract. Azalea insists that the jury waiver clause was such an unconscionable clause. As the Assignments of Error set out earlier show, Azalea never made that contention in the state courts and is therefore precluded from raising it now.

Even if the issue were properly before this court, though, it is without merit. The courts have consistently held that a contract clause waiving trial by jury is not unconscionable, see *David* v. *Manufacturers Hanover Trust Co.,* 298 N.Y.S. 2d 847 (N.Y.Ap. 1969), and the cases cited in that opinion.

Azalea has cited the court to only one case where a clause in a contract waiving trial by jury was found to be unconscionable as defined by the Uniform Commercial Code, *David* v. *Manufacturers Hanover Trust Co.,* 287 N.Y.S.2d 503 (N.Y. Sp. Term 1968). It was precisely that holding which was reversed on appeal in *David* v. *Manufacturers Hanover Trust Co.,* 298 N.Y.S.2d 847 (N.Y.Ap. 1969), discussed above.

What Azalea really contends is that the Supreme Court of Virginia improperly construed the Virginia constitution and common law and the Virginia version of the Uniform Commercial Code when it upheld Azalea's waiver of trial by jury. This court has pointed out from the earliest days, though, that it does not sit to review decisions of the highest state courts on matters of state law. A few cases illustrate that principle.

In *King* v. *West Virginia,* 216 U.S. 92 (1910), Mr. Justice Holmes, said, at p. 101:

> "It is argued that the state court misconstrued the statute, but we have nothing to do with that."

And in *Garner* v. *Louisiana,* 368 U.S. 157 (1961), at p. 166:

> "We of course are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence . . . ."

To the same effect are, for example, *United States* v. *Texas,* 314 U.S. 480 (1941), *Copperweld Steel Company* v. *Industrial Commission of Ohio,* 324 U.S. 780 (1945), *Herb* v. *Pitcairn,* 324 U.S. 117 (1945), and many others. In short, there is no reason for granting certiorari to review the decision by the Virginia Supreme Court that Azalea's jury waiver was valid under state constitutional, statutory and common law.

Azalea, attempting to find a constitutional issue to pique the curiosity of this Court, asserts that it was deprived by its waiver of a Seventh Amendment right to trial by jury in the Circuit Court of the City of Norfolk. It cites no authority for that proposition, and for good reason; all the authority is to the contrary.

This Court disposed of that contention beginning with *Walker* v. *Sauvinet,* 92 U.S. 90 (1875) at p. 92:

> "The States so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge."

In *Hawkins* v. *Bleakly,* 243 U.S. 210 (1917), an Iowa Act which dispensed with trial by jury in certain actions under the Iowa workmen's compensation laws was challenged. In upholding the constitutionality of the Act, this court reiterated that trial by jury "is not embraced in the rights secured by the Fourteenh Amendment," 243 U.S. at 216, and said, at p. 217:

> "The State of Iowa, therefore, is as much at liberty as any other State to abolish or limit the right of trial by jury; or to provide for a waiver of that right, as it has done by the act under consideration."

This Court similarly noted in *Minneapolis and St. Louis R.R.* v. *Bombolis,* 241 U.S. 211 (1916), at p. 217:

> ". . . that the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same."

This Court continued at p. 220:

> ". . . the limitations of the [Seventh] Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore . . . its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States."

See also *Alexander* v. *Virginia,* 413 U.S. 836 (1973), *reh. den.* 414 U.S. 881 (1973).

There is no Seventh Amendment right to trial by jury in a state court on a state cause of action. There is no basis for granting a writ of certiorari to re-examine that principle.

IV.

CONCLUSION

Both the Circuit Court of the City of Norfolk, Virginia, and the Supreme Court of Virginia have given Azalea's claims now asserted in support of a petition for writ of certiorari careful and mature consideration and have rejected them. This Court does not review contested issues of fact by writ of certiorari especially, as here, where two courts have already considered them and the trial court had the opportunity to observe the testimonial demeanor. Nor will this Court grant certiorari to review a state court's determination of state law.

Azalea's waiver of trial by jury was effective and involves no abridgment of constitutional or statutory rights. *Kelly* v. *Kosuga* is well understood and applied and should not be re-examined. Finally, it has been established for more than one hundred years that there is no Seventh Amendment right to trial by jury in a common law action in a state court.

Consequently, there is nothing left for this Court to review. The petition for writ of certiorari should be denied.

Respectfully submitted,

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